IN THE SUPREME COURT OF IOWA

No. 16-0121

WALNUT CREEK TOWNHOMES ASSOCIATION,

Plaintiff-Appellant,

v.

DEPOSITORS INSURANCE COMPANY,

Defendant-Appellee.

REVIEW OF DECISION OF IOWA COURT OF APPEALS DATED July 19, 2017

APPLICATION FOR FURTHER REVIEW

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QUESTION PRESENTED FOR REVIEW

I. THE COURT OF APPEALS INCORRECTLY DETERMINED THE DISTRICT COURT DID NOT HAVE AUTHORITY TO DECIDE COVERAGE MATTERS INVOLVING THE ASSOCIATION'S CLAIM

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STATEMENT SUPPORTING FURTHER REVIEW

The Supreme Court should grant further review under the circumstances of this case. The Court of Appeals has recently issued two opinions relating to the appraisal process in the context of hail claims under insurance policies. North Glenn Homeowner's Association v. State Farm Fire and Casualty Company, No. 16-0912 (Iowa Ct. App. July 6, 2017) (North Glenn II) and Walnut Creek Townhome Association v. Depositors Insurance Company, No. 16-0121(Iowa Ct. App. July 19, 2017). The Court of Appeals has decided "an important question that has not been, but should be, settled by the supreme court." Iowa R. App. P. 6.1103(1)(b)(2). Further, the questions surrounding the appraisal process "present[] an issue of broad public importance that the supreme court should ultimately determine." Iowa R. App. P. 6.1103(1)(b)(4).

The differing nature of how North Glenn II and Walnut Creek proceeded indicates a need for the Supreme Court to decide the important issues surrounding the appraisal process and the power of the appraisal panel. In both cases the insured requested an appraisal pursuant to the insurance policy. Appraisal clauses in insurance policies are standard and thus the appraisals occur frequently and present a recurring broad issue of public importance pertaining to the authority of the panel.

In North Glenn II State Farm was denied the opportunity to proceed with a trial on the merits implicating due process concerns, while in Walnut Creek, Depositors was allow to proceed to trial resulting in the District Court finding in its favor. On appeal in Walnut Creek, the Court of Appeals reversed in part and affirmed in part the District Court's decision. At issue in this Application is the Court of Appeals' determination to "accept the appraisal's conclusions as to the amount of loss and causation as binding and conclusive." Walnut Creek, No. 16-0121, at 14.

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STATEMENT OF THE CASE

Walnut Creek Townhomes Association ("Association") made a claim pursuant to a policy of insurance to Depositors Insurance Company ("Depositors") claiming hail damage to its buildings, particularly the roofs, allegedly caused during a storm on August 8, 2012. (App. 345). Depositors denied the claim for roof damage as a result of the August 8, 2012, storm and thereafter the Association filed suit claiming Depositors breached the insurance contract. (App. 343).

The Association demanded an appraisal. (App. 282). Depositors raised concerns with how the appraisal process would proceed. (App. 332-334). The appraisal was held on May 5, 2015. (Trial Tr. p. 199, ln. 21; App. 199). Each side chose an appraiser, and an umpire was selected on the caveat the umpire would consult with an independent engineer. (Trial Tr. p. 199, ln. 8-20; App. 199). When Eric Howell, Depositors' appraiser, arrived at the appraisal on May 5, 2015, the umpire did not have the independent engineer present to consult. (Trial Tr. p. 199, ln. 21-15 - p. 200, ln. 1-7; App. 199-200).

The matter came before the District Court for a bench trial on May 27-28, 2015. (App. 1-230). On August 19, 2015, the Court issued its Findings of Fact, Conclusions of Law and Judgment ruling in favor of

Depositors denying the Association's breach of contract claim and denying the Association's claim for declaratory judgment. (App. 343-353). Due to the District Court's ruling, the issue raised by Depositors concerning the warranty claim being pursued by the Association related to the shingles was not addressed. (App. 349).

The Association filed motions pursuant to Iowa Rules of Civil Procedure 1.904(2) and 1.1004. (App. 354). The District Court entered its decision on December 21, 2015, upholding its earlier ruling in favor of Depositors. (App. 354-355).

The Association appealed the District Court's decision. (App. 357). The Court of Appeals affirmed in part and reversed in part. The reversal was in error.

STATEMENT OF THE FACTS

On August 8, 2012, a storm occurred and hail fell on the Association's buildings. (Trial Tr. p. 7, ln. 8-11; App. 7). Depositors issued payment in the amount of $124,656.79 for hail damage to the Association's "soft metals" generally known as gutters, downspouts, and facia. (Def. Ex. G; Def. Ex. H, App. 304-305). A reservation of rights letter was issued on February 13, 2013, noting Depositors' reliance upon policy provisions. (App. 249-251). The roof claim was denied. (App. 249-251).

The dispute for resolution by the District Court centered upon whether the hail on August 8, 2012, caused any damage to the roofs at the Association and whether any exclusion applied. (App. 343-353). Depositors presented evidence at trial that no hail damage was sustained to the Association's roofs as a result of the August 8, 2012, storm. (App. 240-248). Depositors also presented uncontested evidence of several additional storms impacting the Association roofs before August 8, 2012, a significant manufacturing defect in the shingles that pre-dated the storm, and wear and tear in support of its reliance upon the policy exclusions. (App. 346-347, 349-351).

Prior to the August 8, 2012, hail storm, the Association knew of issues with the building roofs and had a plan in place to begin replacement of these

roofs. (App. 306-323). The Association minutes beginning on September 20, 2011, nearly 9 months before the August 8, 2012, storm, noted the roof replacement issues and that the Association was discussing a plan to address the roof issues. (App. 308, 311). The Association minutes of October 11, 2011; October 18, 2011; December 20, 2011; January 17, 2012; and June 19, 2012, all mention the roofs and shingle issues. (App. 312-313, 315, 317-323). The Association minutes also show that it was aware of the manufacturer defect in the New Horizon shingles, that the shingles were faulty prior to August 8, 2012, and that the warranty claim with CertainTeed, the shingle manufacturer, would not cover labor costs. (App. 315). The Association had been working with Hedberg & Son Roofing (Mark Gooding) prior to August 8, 2012, related to making the warranty claim for the defective shingles. (App. 322; Trial Tr. p. 170 , ln. 13-25 - p. 171, ln. 1-20; App. 170-171). Prior to August 8, 2012, the Association had a plan in place to begin replacing the roofs and had undergone a process to rate the shingles on a scale of 1 to 5, with 1 being in the worst condition. (App. 306-307).

Upon receipt of the claim following the August 8, 2012, storm, Depositors retained an engineering company, Haag Engineering, to analyze the Association's buildings for storm damage. (App. 240-241). Haag

Engineering has conducted hail impact studies to determine a threshold for the size of hail required to damage the shingles. (Trial Tr. p. 102, ln. 11-25 - p. 103, ln. 1-6; App. 102-103). Based upon the studies for hail damage, a minimum of 1.0 inch diameter hail stones are required for three tab shingles and 1.25 inch stones are required for laminated shingles. (Trial Tr. p. 103, ln. 2-6; App. 103). Two Haag Engineers, Robert A. Danielson, Professional Engineer, and Richard Herzog, Professional Engineer, Registered Roof Consultant, and Meteorologist, inspected the Association's buildings following the August 8, 2012, storm. (App. 240, 243; Def. Ex. B-C).

After the two Haag Engineers completed detailed inspections over a three-day period, reviewed the history of the weather (including nine separate hail events in Urbandale between 2007 through 2012), interviewed John Westlund from the Association and performed additional investigation the engineers deemed appropriate, Haag Engineering concluded there was no hail damage to the Association roofs as a result of the August 8, 2012, storm and issued a detailed report on January 18, 2013. (App. 241-248). The Haag Engineering findings related to the shingles were as follows:

1. There was no hail-caused damage to the shingles on the Walnut Creek Townhome Association property roofs.
2. Shingle surface defects and areas of localized exposed tack coat (minor granular loss) which did not feature a fractured

reinforcing mat were unrelated to hailstone impact, but rather from manufacturing variations, mechanical contact (including foot traffic), and normal weathering effects of the shingles.

3. There were three field shingles and eight hip shingles that had been displaced consistent with wind effects. Those shingles can be economically repaired by replacing damaged units.

(App. 247).

The trial testimony by the eyewitness to the storm, Erin Forke, a resident, was the hail on August 8, 2012, was pea-sized and dime-sized. (Trial Tr. p. 52, ln. 14-16; App. 52). He stated specifically "mainly it was pea-size, and we had large probably dime-size hail." (Trial Tr. p. 52, ln. 15-16; App. 52). Robert Danielson conclusively testified that pea-sized and dime-sized hail are not of sufficient size to cause hail damage to the shingles at the Association. (Trial Tr. p. 148, ln. 19-25 - p. 149, ln. 1-8; App. 148-149). Damage from hail results in fractures, ruptures and bruises in the shingles. (Trial Tr. p. 111, ln. 3-7; App. 111). The Haag Engineers found no such damage caused by hail to the roofs at the Association following the August 8, 2012, storm. (Trial Tr. p. 111, ln. 8-10; App. 111).

The only individual to testify at the trial who had been on the roofs prior to and after August 8, 2012, was Marcus Harbert from Hedberg & Son Roofing. (Trial Tr. p. 170, ln. 13-25- p. 171, ln. 1-20, p. 175, ln. 2-22; App.

170-171, 175). Marcus Harbert has worked for Hedberg & Son Roofing for 18 years, and the company has been in business for 35 years. (Trial Tr. p. 168, ln. 25 - p. 169, ln. 1-3; App. 168-169). He performs roof inspections as part of his job, mainly for hail damage assessments. (Trial Tr. p. 170, ln. 1-12; App. 170).

Marcus Harbert performed a roof inspection at the Association in the summer of 2011 to give an opinion concerning the life expectancy of the roofs. (Trial Tr. p. 170, ln. 13-25 - p. 171, ln. 1-20; App. 170-171). At the time of the inspection in 2011, Marcus Harbert noted that the shingles on the Association roofs were CertainTeed, New Horizons, and that there was a known problem with the shingles which included a manufacturer defect consisting of cracking of the appliques and significant granular loss through the entire shingle. (Trial Tr. p. 172, ln. 15-24; App. 172). At the time of the inspection in 2011, Marcus Harbert was of the opinion that the roofs needed to be replaced and that the roofs would not last the entire manufacturer warranty of 25 years. (Trial Tr. p. 173, ln. 8-25 - p. 174, ln. 1-23; App. 173-174).

Marcus Harbert also inspected the roofs within a week after the August 8, 2012, storm and based upon his inspection did not recommend an insurance claim be pursued by the Association for hail damage to the roofs.

(Trial Tr. p. 175, ln. 2-22; App. 175). Marcus Harbert recommended the Association follow through with the warranty claim to CertainTeed. (Trial Tr. p. 175, ln. 23-25 - p. 176, ln. 12; App. 175-176). Marcus Harbert noted the condition of the shingles were in "very bad condition" and needed to be replaced because of the shingle defect, not as a result of the August 8, 2012, storm. (Trial Tr. p. 176, ln. 5-12; App. 176).

At the time of trial, the Association had continued to pursue the warranty claim with CertainTeed. (Def. Ex. S). Misty Benge, the manager of the Association from Conlin Properties, testified the Association's board directed her to sign a warranty extension. (Def. Ex. S). Misty Benge executed the CertainTeed release on February 4, 2015. (Def. Ex. R, p. R-4). The District Court concluded Depositors' argument regarding an offset as to any damage award related to the warranty claim need not be decided due to the Court's findings in favor of Depositors. (App. 349). The Court of Appeals did not address this issue or direct the District Court to address this issue on remand. Should this matter be remanded to enter the appraisal award, findings are required on this issue of the warranty raised by Depositors at the trial and the impact upon any damages owed.

ARGUMENT

I. THE COURT OF APPEALS INCORRECTLY DETERMINED THE DISTRICT COURT DID NOT HAVE AUTHORITY TO DECIDE COVERAGE MATTERS INVOLVING THE ASSOCIATION'S CLAIM.

Error was preserved on the issue presented. The District Court fully considered the binding nature of the appraisal award and the Court's ability to make coverage determinations. This was the basis for the appeal to the Court of Appeals. The review of construction of an insurance policy is for correction of errors at law. Postell v. American Family Mutual Ins. Co., 823 N.W.2d 35, 41 (Iowa 2012) and Iowa R. App. P. 6.907.

This case arises from a denial of an insurance claim followed by an insured's demand for an appraisal. Throughout the entirety of the process, Depositors maintained the alleged hail damage to the Association roofs was not a covered loss under the policy or was excluded. Following the entry of the appraisal award, Depositors pursued its right to have the coverage question determined by the District Court. The District Court agreed with Depositors.

It is basic law that a determination of whether coverage exists under an insurance policy is a question for a Court to decide. Just v. Farmers Auto Ins. Ass'n, 877 N.W.2d 467, 471 (Iowa 2016). Interpretation of the policy is a matter of law. Id. The Court of Appeals in North Glenn I has previously

held that "coverage questions, such as whether damage is excluded because it was not caused by wind, are legal questions for the court as this case goes forward." North Glenn Homeowners Ass'n v. State Farm Fire & Cas. Co., 854 N.W.2d 67, 70 (Iowa Ct. App. 2014)(citing Quade v. Secura Ins., 814 N.W.2d 703, 706-07 (Minn. 2012)). This is not a new proposition.

Despite this well settled law, the Court of Appeals has recently issued two opinions in the context of hail claims in North Glenn II and Walnut Creek disallowing the District Court to make findings and determinations of coverage holding the appraisal awards were binding These recent decisions are in conflict with the Court of Appeals' prior decision in North Glenn I[1] and the basic premise that matters of coverage are for the District Court to decide.

In the context of appraisal, this Court has held "[a]ppraisal awards do not provide a formal judgment and may be set aside by a court." Central Life Ins. Co. v. Aetna Cas. & Surety Co., 466 N.W.2d 257, 260 (Iowa 1991). "[O]nce the appraisers conclude their work, the issue of coverage may be further litigated," and "the causation determinations by the appraisers may be subject to further review by the district court." North Glenn I, 854 N.W.2d at 71. "Whether the appraisal award will be conclusive on all issues

[1] North Glenn I, North Glenn II, and Walnut Creek were all authored by Judge Bower.

will depend on the nature of the damage, the possible causes, the parties' dispute, and the structure of the appraisal award." Id. (quoting Quade, 814 N.W.2d at 708).

Under the circumstances of this case, the value of the roof replacement ("the amount of loss") was not the central issue. Depositors never agreed the August 8, 2012, hail storm caused damage to the roof and reserved all coverage defenses to be presented to and determined by the District Court. The central issue was based upon the policy and was an issue for the District Court to decide.

The recent Court of Appeals rulings in North Glenn II and Walnut Creek disconnect from those basic principles in finding the appraisal panel had the sole authority to make a causation determination related to the roofs. An appraisal panel does not have the necessary skill, knowledge, or experience to carefully and properly interpret an insurance policy. The appraisal provision in the policy required each party to select a "competent and impartial appraiser"--not a roofing expert, engineer, lawyer or insurance expert. (App. 282).

"Courts across the country are divided as to whether, in determining the 'amount of loss' pursuant to appraisal provisions like the one here, appraisers may consider questions of causation." Auto-Owners Ins. Co. v.

Summit Park Townhome Ass'n, 100 F. Supp. 3d 1099, 1101-02 (D. Colo. 2015). In North Glenn I, the Court of Appeals stated the appraisal panel makes the initial causation determination because "[c]ausation is an integral part of the definition of loss, without consideration of which the appraisers cannot perform their assigned function." North Glenn I, 854 N.W.2d at 71. However, North Glenn I also held "the causation determinations by the appraisers may be subject to further review by the district court." Id.

The inconsistency between North Glenn I and the recent Walnut Creek decision is apparent. In Walnut Creek, the majority focused on "fraud, mistake, or misfeasance" in analyzing the appraisal award which contains a heightened standard. However, questions of "fraud, mistake, misfeasance," only come into question when the parties dispute the amount of the award itself not the District Court's function to determine questions of coverage.

Therefore, the reliance on the "fraud, mistake, misfeasance" standard from Central Iowa by the majority in Walnut Creek is misplaced in this case. See Central Life Insurance Co., 466 N.W.2d at 257 (Iowa 1991). The Central Iowa case did not involve a dispute concerning coverage for the claim. Id. at 258. Rather, the dispute was "on the amount of loss under the policy." Id. Under those circumstances, the Court held an award can only

be set aside when a party "shows fraud, mistake or misfeasance on the part of an appraiser or umpire."[2] Id. at 260 (other citations omitted).

The situation in the Walnut Creek case is distinguished because the dispute was not over the amount of the award for the roofs.[3] Here, the dispute was about the policy provisions. Depositors' claims the award is not binding by the terms of the policy. Under those circumstances, it is the District Court that conducts an analysis of whether the claimed damage is covered by the policy. When the claimed damage is not covered, the District Court has the power to not enforce the appraisal award.

Whether or not causation determinations in appraisals are binding and conclusive on the parties has been considered by courts around the country.

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[2] At the bench trial, Depositors called its appraiser, Eric Howell, to testify of his concern with the appraisal process and unqualified nature of the umpire, Larry Roth. (Trial Tr. p. 197, ln. 15-25, p. 198, ln. 1-2, 21-25, p. 199, ln. 1-25, p. 200, ln. 1-7; App. 197-200). Mr. Howell testified that he agreed to use the umpire with the understanding a qualified engineer would be present with Mr. Roth to provide expert advice to the umpire whether hail had damaged the shingles. (Trial Tr. p. 197, ln. 15-25, p. 198, ln. 1-2, 21-25, p. 199, ln. 1-25, p. 200, ln. 1-7; App. 197-200). The qualified engineer did not appear for the appraisal. (Trial Tr. p. 199, ln. 12-25; App. 199). Thus, the District Court was presented evidence by Depositors of irregularities in the appraisal process rising to the level of mistake or misfeasance. See Central Life Ins. Co., 466 N.W.2d at 260.

[3] There is one caveat, Depositors did argue to the District Court any award entered should be offset by the Warranty being pursued by the Association.

As the Texas Supreme Court aptly noted in State Farm Lloyds v. Johnson:

> Causation relates to both liability and damages because it is the connection between them. . . . In the abstract, it is hard to say whether causation is more a question of liability or damages.
>
> But in actual cases, causation usually falls into one category or the other. Thus, when different causes are alleged for a single injury to property, causation is a liability question for the courts. . . .
>
> Indeed, appraisers must always consider causation, at least as an initial matter. . . . Any appraisal necessarily includes some causation element, because setting the 'amount of loss' requires appraisers to decide between damages for which coverage is claimed from damages caused by everything else.
>
> [W]hether the appraisers have gone beyond the damage questions entrusted to them will depend on the nature of the damage, the possible causes, the parties' dispute, and the structure of the appraisal award. . . .

State Farm Lloyds v. Johnson, 290 S.W.3d 886, 891-93 (Tex. 2009).

The fighting issue in this case had to do with different alleged causes (hail, construction defect, wear and tear) for a single injury to property (the roof). As the Texas Supreme Court correctly noted, in this situation causation is a liability/coverage question for the Court to decide. The Iowa Court of Appeals erred when it ruled that determinations of causation by the

appraisal panel is always binding and conclusive on the District Court in all contexts, including the situation in this case where the question of causation was a question of coverage for the District Court to decide.

Judge McDonald's dissent in the Walnut Creek case identifies the dangers of the mixing of these two distinct legal issues. First, the role of the appraisal panel during the appraisal process and second, the role of the District Court to determine matters involving policy interpretation and coverage. The majority decision by the Court of Appeals improperly mixed these two distinct legal issues resulting in the inappropriate grant of authority to the appraisal panel to solely determine causation rather than limiting their role to the determination of the amount of the loss. By reversing a portion of the District Court's decision, the Court of Appeals impermissibly limited the District Court's ability to determine the causation and resulting coverage questions.

The Depositors' Policy states:

> If we and you disagree on the *amount of loss*, either may make written demand for an appraisal of the loss. In this event, each party will select a competent and impartial appraiser after receiving a written request from the other, and will advise the other party of the name of such appraiser within 20 days. The two appraisers will select an umpire. If appraisers cannot agree, either may request that selection be made by a judge of a court having jurisdiction. *The appraisers will state separately*

> *the value of property and the amount of loss*. If they fail to agree, they will submit their differences to the umpire. A decision agreed by any two will be binding. Each party will:
> a. Pay its chosen appraiser; and
> b. Bear the other expenses of the appraisal and umpire equally.
>
> *If there is an appraisal, we will still retain our right to deny the claim.*

(App. 282, ¶ E2)(Emphasis added).

The plain language of the Policy limits the authority of the appraisers and umpire to determine "the amount of loss" and nothing else. The award itself states "[t]he award does not include an evaluation or determination of coverage, policy exclusions or relative causation of the same." (App. 271). The District Court recognized Depositors participated in the appraisal "subject to an explicit reservation of the right to challenge coverage after completion of the Appraisal." (App. 348). The appraisal panel was not qualified to resolve coverage matters based upon intricate policy language and legal interpretations.

Further, the appraisal process was not an arbitration process which binds the insurer. No arbitration rules were in force for the Walnut Creek appraisal and Depositors objected to the process proceeding in such fashion. (App. 332). The policy provides no parameters for the process.

The Court of Appeals has previously recognized in an unpublished decision that there is a distinction between "appraisal" and "arbitration" noting that "both proceedings are designed to effect speedy and efficient resolutions in lieu of judicial proceedings, [and that] arbitration will generally decide an entire controversy." Taylor v. Farm Bureau, 759 N.W.2d 2, at *4 (Iowa Ct. App. 2008) (unpublished decision) (other citations omitted). In the Taylor case, the Court of Appeals went on to further distinguish the proceedings noting "[a]n appraisal, on the other hand, establishes only the amount of the loss and not liability for the loss under the insurance policy." Id. (citing Terra Industries Inc. v. Commonwealth Ins. Co. of America, 981 F. Supp. 581, 607 (N.D. Iowa 1997)). Additionally, it was recognized that while "arbitrations are governed by Iowa Code chapter 679A, [t]here is no corresponding statute governing appraisal proceedings." Id. at *5. In Taylor, the parties agreed to proceeding under the rules established for arbitration. Id. Depositors never agreed to proceed with an arbitration and never agreed to be bound by the appraisal award for an uncovered item.[4]

[4] An excellent example is the air conditioning units. The Appraisal award provided an amount owed by Depositors for those units. However, those units were not owned by the Association and therefore not covered under the policy. Thus, the appraisal award is inherently flawed.

To limit the function of the District Court to determine coverage matters also implicates Due Process guarantees of the Fifth Amendment applicable to the state through the Fourteenth Amendment. The Iowa Constitution provides a similar protection. See Iowa Const. art. I, § IX. There is no process outlined in the policy for the appraisal to follow. During the appraisal process (unlike arbitration), there is no opportunity for discovery, to examine witnesses, to confront witnesses, or to offer evidence. There is no burden of proof or standards for the panel to follow.

Furthermore, the appraisers and umpire are generally experienced in construction matters and are not trained legally or experienced in reviewing and interpreting insurance provisions. The District Court and the litigation process, on the other hand, have all of these processes in place to guarantee Due Process. To conclusively hold an appraisal award is binding without the opportunity for discovery and a trial takes away those constitutional guarantees.

CONCLUSION

For all of these reasons, Depositors respectfully requests the Supreme Court grant further review in this matter. These matters concerning appraisal clauses in insurance policies and the authority of an appraisal panel present a recurring broad issue of public importance. These matters are of

such public importance that the Supreme Court needs to make the ultimate decision.

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ATTORNEYS FOR DEFENDANT-APPELLEE CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE AND TYPE-STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.1103(4) because:

[X] this brief contains 4,336 words, which does not exceed two-fifths of the length limitations for a required brief in Iowa R. App. P. 6.903(1)(g) excluding the parts of the brief exempted the Rule.

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.1103(1)(c) following the form prescribed in 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because:

[X] this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

/s/ Apryl M. DeLange August 7, 2017

Apryl M. DeLange Date

CERTIFICATE OF SERVICE AND FILING

Counsel for Depositors Insurance Company certifies on August 7, 2017, this document was filed using the Electronic Filing System of the Court which automatically serves an electronic copy to:

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ATTORNEYS FOR DEFENDANT-APPELLEE

DECISION OF THE COURT OF APPEALS

The decision of the Court of Appeals dated July 19, 2017, is attached to this Application for Further Review.

IN THE COURT OF APPEALS OF IOWA

No. 16-0121
Filed July 19, 2017

WALNUT CREEK TOWNHOME ASSOCIATION,
Plaintiff-Appellant,

vs.

DEPOSITORS INSURANCE COMPANY,
Defendant-Appellee.

Appeal from the Iowa District Court for Polk County, Robert B. Hanson, Judge.

Walnut Creek appeals the district court's rejection of an appraisal report.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

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Heard by Mullins, P.J., and Bower and McDonald, JJ.

BOWER, Judge.

In August 2012, a hailstorm struck the Walnut Creek Townhome Association ("Walnut Creek" or "the association"), a housing community located in Urbandale. The association submitted an insurance claim to its insurer, Depositors Insurance, which denied most of the claim. Walnut Creek subsequently brought an action against Depositors for breach of contract and to seek a declaratory judgment. Before trial, the parties went before an appraisal panel. The panel found the association sustained approximately $1.4 million in damages as a result of the August 2012 hailstorm. The district court, however, concluded the association was not entitled to any relief. Walnut Creek now appeals.

I.

As of August 2012, Walnut Creek contained thirty-six multi-family buildings. Buildings in the association were constructed between 2004 and 2006. The association is governed by a board of directors.

In 2011, the board had discussions about the necessity of repairing roofs in the association. It hired a roof inspector, Marcus Harbert, to review the association's buildings. Harbert noticed issues with the shingles of the roofs he inspected. The shingles Walnut Creek primarily used were known as CertainTeed New Horizon shingles. New Horizon shingles, several experts testified, are known to have a manufacturer's defect that causes cracking and

crazing in the shingle appliqué, and significant granule loss in the shingle.[1] At a board meeting in June 2012, a representative from Harbert's employer told the board the shingles "could possibly be faulty." In response, the board formed a roofing committee.

On August 8, 2012, a hailstorm hit Urbandale and the surrounding area, including the association. The hail in the neighborhood was reported to be "pea size" to "dime size." Association members reported leaking roofs, loose shingles, and grit or grain coming off the roofs after the storm.

In August 2012, "within a week" of the storm, Harbert inspected the roofs again. He did not observe any hail impacts significant enough to warrant an insurance claim. Harbert recommended the association follow through with a warranty claim for the defective shingles. Coincidentally, Harbert lived in Walnut Creek for a year, and testified another storm in September 2013 blew shingles off roofs. Harbert also observed the roofs again in May 2015 and concluded the roofs had sustained two to three hail hits per square,[2] but that the only reason to replace the roofs was the manufacturer's defect.

In September 2012, Walnut Creek had a roofing renovator, Nick Waterman, inspect the roofs. He concluded the roofing "definitely" had hail damage, noting "anywhere from eight to twelve hits" per square. Waterman testified his standard practice was to ignore hail hits to the appliqué because such damage is "not accepted in the insurance-related field." He would, in

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[1] "Crazing" was described as cracks in the asphalt "meandering in different directions" unpredictably. The "appliqué" is a raised portion of a shingle used to create a textured look.

[2] Squares are ten feet by ten feet. The insurance industry standard to replace a roof is six to eight hits per square.

certain circumstances, double the size of the area he sampled to make up for the fact the appliqué accounted for roughly half the area of the individual shingle. In this case, he testified he "voided" the appliqué because he was aware of the manufacturer's defect. Waterman also testified he observed hail damage to the "soft metal, fascia, gutters, air conditioner units, [and] window screens."

Two engineers from Haag Engineering testified: Robert Danielson and Richard Herzog. Haag Engineering was retained by Depositors to inspect the association buildings in December 2012. The firm prepared a report on its findings. Danielson noted there were nine "hail events" in the Urbandale area between 2006 and September 2012. Danielson also noted one building, Building 19, did not have the New Horizon shingle. The Haag Engineering report states the appliqué shingles were "generally in poor condition" but the "three-tab shingles [on Building 19] were generally in good to fair condition with respect to weathering." Danielson testified he looked for fractures, punctures, ruptures, bruises, or holes to conclude a roof was damaged by hail. He did not see signs of that. He did observe granular loss in the shingles. Herzog testified, given the weight of the shingles, the hail in the community would have been of insufficient size to cause damage.[3] The Haag Engineering report further stated, of nineteen fractures and punctures on the vinyl siding, most were either not consistent with hail damage or not caused by the most recent hail event. Only one, the report concluded, was consistent with recent hail impact "as noted by the coincident spatter mark and on an elevation that was consistent with the most recent hailstorm event."

[3] There was evidence sufficiently large hail fell elsewhere in Urbandale.

In 2013, a public adjuster, Timothy Barthelemy, assessed the thirty-six Walnut Creek buildings and made conclusions similar to Waterman's. Generally, his conclusion was that hail caused damage to the properties. His team of inspectors observed nine to eleven hits per square in the area assessed. He also excluded the appliqué from his assessment. Barthelemy had conducted "probably 400" appraisals. Barthelemy testified sometimes hail damage takes "a winter" to show up in a shingle. Barthelemy also testified he discussed the damage with Danielson. In Barthelemy's view, fracture or not, damage existed. According to Barthelemy, the policy covers "physical damage or physical loss. So I'm looking for something that the shingle is physically damaged, and that would be cosmetic damage." Danielson agreed cosmetic damage is physical damage. The Haag Engineering report concluded "[d]ents in the gutters, downspouts, fascia and trim, window cladding, window screens, and flue caps related to hail fall were a cosmetic condition that would not functionally alter the material."

Depositors denied most of Walnut Creek's claim on February 13, 2013. Depositors agreed to pay $124,656.79 based on small dents to the "soft metal" items, including fascia, gutters, and downspouts. Depositors stated damage to windows and air conditioning units was not covered under the policy. In August 2013, Walnut Creek filed suit for breach of contract and a declaratory judgment.

The parties' insurance policy provides for appraisal. Walnut Creek requested appraisal. In July 2014, Walnut Creek moved for summary judgment and asked the district court to approve language to be used on the appraisal form. In its summary judgment ruling in October 2014, the court declined to

approve any language, but sought to "clarify what issues in this case are determinable by appraisers and which issues are properly saved for litigation." The court concluded "[t]he parties may fully litigate whether *all* of the loss to the property was a result of a covered event (here, the hail storm)—in other words, whether the *cause* of the damage is *covered* under the policy." The court also stated "[t]he appraisers and umpire must consider what damage was caused by hail, what damage was not, or damage with which they are unconcerned, such as normal wear and tear." The appraisal took place May 5, 2015, only a few weeks before trial.

Depositors' appraiser, Eric Howell, a property adjuster, also testified. Howell testified he had concerns about the appraisal umpire, Larry Roth, because Roth's experience was, in Howell's view, with fire and water losses, not hail damage. However, Howell agreed to use Roth as the umpire because, Howell testified, he believed Roth would be bringing "an independent engineer experienced in assessing hail damage" with him. No such person was present at the appraisal. Howell testified he did not sign off on the appraisal award form because he "disagreed with what was being presented as a final number." Howell testified he was reluctant to stop the appraisal because it had been rescheduled "a couple times" due to weather and trial was "right around the corner."

Waterman, Barthelemy, and Danielson were all present at the appraisal. Roth served as the umpire on the panel. Walnut Creek selected James Pierce as its appraiser and Howell served as Depositors' appraiser. Evidence was presented to the appraisal panel, including the Haag Engineering report. Five

buildings were inspected as part of the appraisal. The appraisal panel was aware of Walnut Creek's warranty option.

The appraisal award begins with a declaration of competence and disinterest signed by both appraisers. It next contains this statement:

> The Appraisers and Umpire above-referenced hereby agree and stipulate that the appraisal herein is limited in scope to the amount of loss and damage as a result of a hail and windstorm that occurred on or about August 8, 2012. The award does not include an evaluation or determination of coverage, policy exclusions or the relative causation of the same.

The award section contains four itemized awards. Each is listed with a description of the property damaged, a replacement cost, a depreciation percentage, a depreciation amount, and an actual cash value. The four items listed are "direct physical loss roofing," "matching roofing (additional)," "siding, gutters, fascia," and "air conditioners." The appraisal concludes with this: "We, the undersigned, pursuant to our appointment, certify that we have truly, conscientiously and impartially performed the duties assigned us and have appraised and determined and do hereby award the following amount of loss. Minimum of two signatures required." Pierce and Roth signed the appraisal award. The combined amount of loss is $1,467,830, representing the total replacement cost for the four property items listed.

A bench trial was held May 27 and 28, 2015. The district court concluded the appraisal was not binding or conclusive and dismissed Walnut Creek's claims. This appeal followed.

II.

Depositors challenges the timeliness of Walnut Creek's appeal. A party has thirty days to appeal a final judgment. *See* Iowa R. App. P. 6.101(1)(b). Judgment herein was entered August 19, 2015. Walnut Creek filed a post-judgment motion on September 3. The post-judgment motion requested enlargement or amendment pursuant to Iowa Rule of Civil Procedure 1.904(2) and a new trial pursuant to rule 1.1004. Such motions may toll the appeal period. *See id.* The district court denied those motions in an order issued December 21. Walnut Creek's notice of appeal followed within thirty days of that order.

Depositors asserts Walnut Creek's appeal is untimely because the 1.904(2) motion was improper. Our supreme court has repeatedly held only "proper" 1.904(2) motions toll the appeal period. *See, e.g.*, *Hedlund v. State*, 875 N.W.2d 720, 725 (Iowa 2016). Depositors asserts Walnut Creek's 1.904(2) motion was simply an improper "rehash" of previous arguments. *See Bellach v. IMT Ins. Co.*, 573 N.W.2d 903, 905 (Iowa 1998). We disagree. In its ruling on the motions, the district court issued a "clarification" on burden-shifting that amounts to an amendment or enlargement of its previous ruling. *Cf. McKee v. Isle of Capri Casinos, Inc.*, 864 N.W.2d 518, 526 (Iowa 2015) ("The district court in fact modified [one] aspect of its original ruling when it acted on McKee's motion."). Therefore, the 1.904(2) motion was a proper one and the appeal is timely.

Additionally, Walnut Creek also brought a motion for new trial. We are aware of no rule requiring a motion for new trial to conform to the same propriety requirement as a 1.904(2) motion. Where the case law refers to a "proper"

motion for new trial, the term "proper" unfailingly either (a) refers to timeliness or (b) appears in dicta with citations to 1.904(2) cases. *See, e.g.*, *Union Tr. & Sav. Bank v. Stanwood Feed & Grain, Inc.*, 158 N.W.2d 1, 3 (Iowa 1968) (equating "improper" with "untimely"); *In re J.L.*, 868 N.W.2d 462, 465 (Iowa Ct. App. 2015) (citing string of 1.904(2) cases). If we were to conclude a motion for new trial must be "proper" to toll the appeal period, we might find it need only identify some enumerated basis for new trial. *See* Iowa R. Civ. P. 1.1004(1)-(9). The district court here found two such bases in Walnut Creek's motion—1.1004(6) and 1.1004(8). Under any test we might use, the motion for new trial tolled the appeal period. The appeal is timely.

III.

The appraisal process allows parties a forum for dispute resolution without a formal lawsuit. *See Cent. Life Ins. Co. v. Aetna Cas. & Sur. Co.*, 466 N.W.2d 257, 260 (Iowa 1991). Policy provisions providing for appraisal are valid and binding on the parties. *See id.* Under the terms of the insurance policy at issue, either party could demand appraisal of the loss:

> **Appraisal.** If we and you disagree on the amount of loss, either may make written demand for an appraisal of the loss. In this event, each party will select a competent and impartial appraiser after receiving a written request from the other, and will advise the other party of the name of such appraiser within 20 days. The two appraisers will select an umpire. If appraisers cannot agree, either may request that selection be made by a judge of a court having jurisdiction. The appraisers will state separately the value of property and the amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding. Each party will:
>
> a. Pay its chosen appraiser; and
> b. Bear the other expenses of the appraiser and umpire equally.

> If there is an appraisal, we will still retain our right to deny the claim.

"Most courts favor appraisal as a way of avoiding costly and time-consuming litigation." 12 Jeffrey E. Thomas, New Appleman on Insurance Law Library Edition § 149.07(1)(k) (2016) ("Appleman"); *see also First Nat'l Bank v. Clay*, 2 N.W.2d 85, 91 (Iowa 1942). As a result, although appraisal awards may be set aside by a court, courts will indulge in every reasonable presumption to sustain the award. *See* Appleman § 149.07(1)(k); *see also Cent. Life*, 466 N.W.2d at 260; *Seibert Bros. & Co. v. Germania Fire Ins. Co.*, 106 N.W. 507, 508 (Iowa 1906); *cf. Ales v. Anderson, Gabelmann, Lower & Whitlow, P.C.*, 728 N.W.2d 832, 839 (Iowa 2007) (noting, in arbitration context, court's function "is not to determine whether the arbitrator has correctly resolved the grievance" because such second-guessing would "nullify the very advantages of arbitration"). "The award will not be set aside unless the complaining party shows fraud, mistake or malfeasance on the part of an appraiser or umpire." *Cent. Life*, 466 N.W.2d at 260; *see also Jupiter Aluminum Corp. v. Home Ins. Co.*, 52 F. Supp. 2d 885, 888 (N.D. Ill. 1999) ("[A] party who voluntarily submits to appraisal to determine the amount due under an insurance policy is bound by the appraisal award, absent exceptional circumstances. To hold otherwise would frustrate the very purpose of the appraisal clause."); Appleman § 149.07(1)(k); *cf. United States v. Moorman*, 338 U.S. 457, 461 (1950) ("Findings of [an arbitrator], even where employed by one of the parties, were held 'conclusive, unless impeached on the ground of fraud, or such gross mistake as necessarily implied bad faith.'" (citation omitted)); *Ky. River Mills v. Jackson*, 206 F.2d 111, 117 (6th

Cir. 1953) ("But it is the proof of bias or unfairness or partiality on the part of an arbitrator that results in unjust advantage, and calls for the setting aside of the award."). The award will not be set aside simply because the court disagrees with the result. *See Cent. Life*, 466 N.W.2d at 260; *cf. Ales*, 728 N.W.2d at 839 (asserting comparable standard in arbitration context).

By the terms of the policy, "the amount of loss"—damages—is a factual issue left to the determination of the appraisers. *See Terra Indus., Inc. v. Commonwealth Ins. Co.*, 981 F. Supp. 581, 607 (N.D. Iowa 1997); *Taylor v. Farm Bureau Mut. Ins. Co.*, No. 07-1580, 2008 WL 4525496, at *4 (Iowa Ct. App. Oct. 1, 2008). Whether coverage under a policy exists—liability—is a question for the court. *See Just v. Farmers Auto Ins. Ass'n*, 877 N.W.2d 467, 471 (Iowa 2016) ("Generally, interpretation of an insurance policy is a question of law."); *Adams v. N.Y. Bowery Fire Ins. Co.*, 51 N.W. 1149, 1150 (Iowa 1892) ("Clearly the appraisers were not authorized to exercise their judgment as to what was or was not included within the policy."); *North Glenn Homeowners Ass'n v. State Farm Fire & Cas. Co.*, 854 N.W.2d 67, 70 (Iowa Ct. App. 2014) ("Coverage questions, such as whether damage is excluded because it was not caused by wind, are legal questions for the court as this case goes forward." (citing *Quade v. Secura Ins.*, 814 N.W.2d 703, 706–07 (Minn. 2012))); *see also Taylor*, 2008 WL 4525496, at *4 (contrasting role of court in appraisal proceedings with arbitration, which "will generally decide an entire controversy").

"Causation relates to both liability and damages because it is the connection between them." *State Farm Lloyds v. Johnson*, 290 S.W.3d 886, 891–92 (Tex. 2009). "Courts across the country are divided as to whether, in

determining the 'amount of loss' pursuant to appraisal provisions like the one here, appraisers may consider questions of causation." *Auto-Owners Ins. Co. v. Summit Park Townhome Ass'n*, 100 F. Supp. 3d 1099, 1101–02 (D. Colo. 2015); *see also North Glenn*, 854 N.W.2d at 70. In Iowa, appraisers make the initial causation determination, because "[c]ausation is an integral part of the definition of loss, without consideration of which the appraisers cannot perform their assigned function." *North Glenn*, 854 N.W.2d at 71 (citing *Loss*, Black's Law Dictionary (9th ed. 2009)); *see also Quade*, 814 N.W.2d at 708 ("[A]s an incidental step in the appraisal process . . . the appraisers must necessarily determine the cause of the loss, as well as the amount necessary to repair the loss."). The policy's "appraisal of the loss" therefore requires the appraisal panel to make causation determinations. *See CIGNA Ins. Co. v. Didimoi Prop. Holdings, N.V.*, 110 F. Supp. 2d 259, 264–65 (D. Del. 2000) ("Black's Law Dictionary defines the term 'amount of loss' as 'the diminution, destruction, or defeat of the value of, or of the charge upon, the insured subject to the assured, *by the direct consequence of the operation of the risk insured against*, according to its value in the policy, or in contribution for loss, so far as its value is covered by the insurance.' Thus, the definition provided by Black's expressly includes a causation element." (citing *Amount of loss*, Black's Law Dictionary 83 (6th ed. 1990))). However, "the causation determinations by the appraisers may be subject to further review by the district court." *North Glenn*, 854 N.W.2d at 71. This is a necessary check on fraud, mistake, or malfeasance. *See Cent. Life*, 466 N.W.2d at 260. The trial court is therefore empowered to act in something of an appellate role. *Cf. Wallace v. Des Moines Indep. Cmty. Sch. Dist. Bd.*, 754

N.W.2d 854, 858 (Iowa 2008) (explaining certiorari is available to review judicial or quasi-judicial functions); *Cent. Life*, 466 N.W.2d at 261 ("[T]he function of the appraiser becomes quasi-judicial."). "[W]hether the appraisal award will be conclusive on all issues will depend on the nature of the damage, the possible causes, the parties' dispute, and the structure of the appraisal award." *North Glenn*, 854 N.W.2d at 71 (citing *Quade*, 814 N.W.2d at 708).

The district court performed a *North Glenn* analysis and held the appraisal award was not binding upon the parties. Walnut Creek contends the district court should have held the appraisal award was binding and conclusive on the issue of causation. We review such determinations for correction of errors at law. *See Van Sloun v. Agans Bros., Inc.*, 778 N.W.2d 174, 178 (Iowa 2010).

In conducting its *North Glenn* analysis, the district court wrote:

> In light of the *North Glenn* factors, the Court finds the Appraisal Award is neither binding nor conclusive upon the parties. First, the defective and deteriorating shingles are at the core of the Association's roof damage. This is shown by Harbert's 2011 examination of the roofs, Association's board discussions, and Association's attempt to exclude the defective portions from the damage calculations. Second, Association's roof damage resulted from multiple concurrent causes, including the significant and pre-existing manufacturer's defect and multiple severe weather events. The August 8, 2012 storm was only one of several possible causes of damage to the roofs. Third, Association was aware or should have been aware of the Policy exclusions: Depositors stated the exclusions in the contract and reserved their right to raise all defenses in multiple pieces of correspondence. Further, for almost a year prior to the storm, Association was making plans to replace the roofs via a manufacturer's warranty. Finally, the Appraisal is not signed by all parties and addresses only one of multiple causes for the roof damage. Because Association has not shown by a preponderance of the evidence that the Appraisal Award is binding and conclusive on the parties, the Court holds that the parties are not bound by the Appraisal Award and its conclusions.

We conclude the district court misapplied the *North Glenn* factors. The purpose of the *North Glenn* test is not to substitute the court's fact finding for the appraisal panel's. The purpose is to evaluate the structural and environmental underpinnings of the appraisal award and search out evidence of fraud, mistake, or malfeasance. Upon our independent consideration of the *North Glenn* factors, we see no reason to reject this appraisal award: the nature of the damage, possible causes, parties' dispute, and structure of the appraisal do not suggest fraud, mistake, or malfeasance. We therefore accept the appraisal's conclusions as to the amount of loss and causation as binding and conclusive.

IV.

Walnut Creek challenges the district court's finding Depositors did not breach the contract because the alleged loss was not covered under the policy. We begin our analysis with the burden of proof. When an insured seeks to enforce a provision of an insurance policy, "the burden of proof initially is on the insured to prove that both the property and the peril were covered by the terms of the policy." *Hometown Plumbing & Heating Co. v. Secura Ins. Co.*, No. 11-0309, 2012 WL 1245755, at *4 (Iowa Ct. App. Apr. 11, 2012); *see* 17A *Couch on Insurance* § 254:11 (2016) ("Generally speaking, the insured bears the burden of proving all elements of a prima facie case including the existence of a policy, payment of applicable premiums, compliance with policy conditions, the loss as within policy coverage, and the insurer's refusal to make payment when required to do so by the terms of the policy."). Once the insured has established a prima facie case, "[t]he burden of proving that coverage is excluded by an exclusion or exception in the policy rests upon the insurer." *West Bend Mut. Ins. Co. v. Iowa*

Iron Works, Inc., 503 N.W.2d 596, 598 (Iowa 1993); *see Long v. Glidden Mut. Ins. Ass'n*, 215 N.W.2d 271, 274 (Iowa 1974) ("[A]n insurer has the burden to prove the applicability of a policy exclusion. The insured is not required to negate the exclusion in order to present a prima facie case." (citations omitted)); 17A *Couch on Insurance* § 254:12 (2016) ("Until a prima facie case of coverage is shown, the insurer has no burden to prove a policy exclusion. The insurer bears the burden of proving the applicability of policy exclusions and limitations or other types of affirmative defenses, in order to avoid an adverse judgment after the insured has sustained its burden and made its prima facie case."). In both cases, the standard of proof is preponderance of the evidence, absent any higher burden required by statute. *See Hometown Plumbing & Heating Co.*, 2012 WL 1245755, at *4.

The law regarding the interpretation and construction of insurance policies is well established and need not be repeated herein. *See Amish Connection, Inc. v. State Farm Fire & Cas. Co.*, 861 N.W.2d 230, 236 (Iowa 2015).

We turn to the language of the policy at issue. Under the heading "EXCLUSIONS," the policy states in part:

> **B. EXCLUSIONS**
> 1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss. These exclusions apply whether or not the loss event results in widespread damage or affects a substantial area.
> . . . .
> 2. We will not pay for loss or damage caused by or resulting from any of the following: . . . .
> *l.* Other Types Of Loss
> (1) Wear and tear;

> (2) Rust or other corrosion, decay, deterioration, hidden or latent defect or any quality in property that causes it to damage or destroy itself;
>
> . . . .
>
> But if an excluded cause of loss that is listed in paragraphs (1) through (7) above results in a "specified cause of loss", "accident" or building glass breakage, we will pay for the loss or damage caused by that "specified cause of loss" or building glass breakage.
>
> . . . .
>
> 3. We will not pay for loss or damage caused by or resulting from any of the following B.3.a. through B.3.c. But if an excluded cause of loss that is listed in B.3.a. through B.3.c. results in a Covered Cause of Loss, we will pay for the loss or damage caused by that Covered Cause of Loss.
>
> . . . .
>
> c. Negligent Work. Faulty, inadequate, or defective:
>
> . . . .
>
> (3) Materials used in repair, construction, renovation or remodeling[.]

In section A(3) of the policy, "Covered Causes of Loss" are defined as follows: "This Coverage Form insures against Risks of Direct Physical Loss unless the loss is" excluded under the EXCLUSIONS heading (section B), limited under "paragraph A.4, LIMITATIONS," or limited or excluded by two headings called PROPERTY LOSS CONDITIONS (section E) and PROPERTY GENERAL CONDITIONS (section F). Elsewhere in the policy "specified cause of loss" is defined to include "windstorm or hail," among other conditions.[4]

The district court first concluded the policy excluded coverage of the roof damage because Walnut Creek "did not prove the storm was the only direct or indirect cause of physical damage to the roofs." That language and the district court's citation to the policy demonstrate the court was relying on EXCLUSIONS paragraph B(1) of the policy. This was a mistake. Sections B(1)(a) through (i)

[4] This fact may come as a surprise to Depositors, which omitted the "hail" exception from its brief in this hail case.

list several exclusions not relevant here; for example, "nuclear hazard" and "war and military action." Only B(2) is relevant; no section of B(1) is implicated by the damage at issue. It was incorrect for the district court to rely on the language of B(1).

The district court next concluded the shingles contained a product defect that triggered deterioration, coverage of which would be excluded under paragraph B(2)(*l*)(2) of the policy. We find this is inconsistent with the binding conclusions of the appraisal panel and must be rejected. The appraisal panel's binding fact findings support the conclusion hail caused this damage.

Finally, the district court concluded the defective construction bars recovery under the policy's "Negligent Work" exclusion. This provision is irrelevant given the binding appraisal findings. The panel concluded the damage did not result from defective construction of the type contemplated by the policy provision.

V.

Finally, Walnut Creek requests additional funds to pay its "soft metals" replacement costs. The "soft metals" are the siding, gutters, and fascia. Depositors did grant a portion of Walnut Creek's claim for the amount of $124,656.79, based on this damage. Subsequently, the appraisal panel calculated $159,541.51 (in replacement cost) or $119,656.51 (actual cash value) for damages to these portions of the buildings and awarded the replacement cost. Walnut Creek requests the difference between the $124,656.79 it has received and the $159,541.51 it believes it is owed. It is incorrect in that belief. The policy provides: "We will not pay on a replacement cost basis for any loss or

damage . . . until the lost or damaged property is actually repaired or replaced." There is no evidence in the record the "soft metals" have been repaired or replaced; indeed, at oral argument, Walnut Creek argued it has not made repairs because it believes Depositors should pay it first. This claim fails.

VI.

The district court erred in rejecting the appraisal award. Because of that error, the district court erred in its application of the policy. The facts of this case and the applicable law compel a different result. We reverse the judgment of the district court as to the appraisal award and breach of contract claim. We remand with directions to enter judgment in favor of Walnut Creek consistent with the appraisal panel's award, excluding the amount predicated on damage to the air conditioning units, which are not covered under the policy. Without a showing it has completed repairs to the "soft metals," Walnut Creek is not entitled to additional payment on a replacement cost basis for the "soft metals" items. We affirm the judgment of the district court on the "soft metals" issue.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Mullins, P.J., concurs; McDonald, J., dissents.

MCDONALD, Judge (dissenting).

As the majority notes, "[c]ourts across the country are divided as to whether, in determining the 'amount of loss' pursuant to appraisal provisions like the one here, appraisers may consider questions of causation." *Auto-Owners Ins. Co.*, 100 F. Supp. 3d at 1101–02. In *North Glenn*, 854 N.W.2d at 70, this court held appraisers could determine causation because determining causation is integral to determining the amount of loss. I respectfully disagree with *North Glenn* and dissent from the majority's conclusions that the determination of causation is a proper subject of appraisal and that the appraisal award was binding under the circumstances. I also respectfully dissent from the majority's conclusion the district court erred in concluding any loss was an excluded cause of loss. I would affirm the judgment of the district court.

I.

A.

I first address whether the determination of causation is an appropriate function of an appraisal panel, generally. *North Glenn* and similar cases state that determination of the amount of loss necessarily involves the determination of causation. I disagree with this conclusion in two respects. First, this conclusion wrongly conjoins separate legal issues. A "loss" is the "amount of financial detriment caused by . . . an insured property's damage, *for which the insurer becomes liable*." *Loss*, Black's Law Dictionary (10th ed. 2014) (emphasis added). The determination that a loss has occurred is a determination of liability, which necessarily includes questions of causation. *See, e.g., Iowa Elec. Light & Power Co. v. Gen. Elec. Co.*, 352 N.W.2d 231, 234 (Iowa 1984) (stating

causation is a liability concept). The appraisal provision does not give the appraisers the authority to determine whether there is "a loss." Instead, the appraisal provision gives the appraisers the authority to determine "the amount" of "the loss." The determination of "the amount" is a question of damages, which does not include determinations of causation and liability. This understanding is consistent with the general understanding of appraisal. *See* Steven Plitt et. al., *Scope of Appraisal*, 15 COUCH ON INSURANCE § 210:42 (2017) ("As a general rule, the sole purpose of an appraisal is to determine the amount of damage.").

Second, the conclusion that determination of value *necessarily* involves determination of causation is not factually correct. Consider this case. Here, the parties disagreed on whether the storm caused any damage to the roofs and whether any damage was an otherwise excluded loss. There is no reason why the appraisers could not have went to the property, inspected the roofs the insured claimed to be damaged, determined the repair and/or replacement costs of the roofs, and issued an appraisal award without knowing what caused the damage, if any, to the roofs. The parties could then have litigated liability, including questions of causation and coverage, in the district court. If there was a finding the insurer was liable under the terms of the policy, then the appraisal award would be a binding measure of damages.

Not only is the separation of valuation and causation easily accomplished, it seems preferable. For example, in this case, the insurance carrier contended any damage to the roofs was caused by, among other things, prior, uncovered weather events. The appraisers would not necessarily have had any reason to know about the disputed issues. The appraisers also would not have had the

competency or authority to investigate the issue further. The appraisers would not have had, for example, the power to subpoena weather records, the association's records regarding past claims, or the insurance carrier's records regarding the past claims. The appraisers would not have had the competency or authority to interview relevant witnesses, for example, prior homeowners with personal knowledge of the condition of the roofs prior to the most recent storm. The parties, however, could have conducted such discovery separate and apart from the appraisal process.

Separating the valuation and causation determination is also good policy. Empowering an appraisal panel to determine causation raises due process concerns. Take, for example, the appraisal provision at issue in this policy. It does not set forth any process to litigate causation. There is no mechanism for discovery, the taking of testimony, the right of cross-examination, or the making of a record. There is no direction to the appraisers or umpire regarding the standard of proof and the burden of proof. Limiting the scope of appraisal to the valuation of property makes appraisal an efficient and straightforward process. It can be accomplished quickly and without the necessity of a hearing and the creation of a record. In contrast, allowing an appraisal panel to determine issues of causation raises future points of contention and litigation, including the qualification of the appraisers, the competency of the appraisers, the partiality of the appraisers, and whether the burden of proof to establish an event is a covered cause of loss and whether any exclusions are applicable. As this case demonstrates, expanding the scope of appraisal to include causation transforms an efficient dispute-resolution mechanism into an inefficient litigation-creating

mechanism requiring cumbersome rounds of duplicative litigation. Timothy P. Law & Jillian L. Starinovich, *What Is It Worth: A Critical Analysis of Insurance Appraisal*, 13 Conn. Ins. L.J. 291, 296–97 (2007) ("In our view, the scope of appraisable disputes should generally be limited to issues of valuation. Appraisal is designed to provide an inexpensive determination of the amount of loss where coverage is conceded. Allowing, or even requiring, parties to appraise a loss that involves other issues, such as liability or causation, can create multiple proceedings and inefficiencies."). The first round occurring in front of the neutral umpire. The second round occurring in front of the district court. The third round occurring in the appellate courts.

Consider another case to demonstrate both how easily valuation can be separated from causation and the potential mischief created by allowing the appraisal panel to determine both issues. *Salem United Methodist Church v. Church Mutual Insurance Company*, No. 16-0170, 2017 WL 512494, at *1-2 (Iowa Ct. App. Feb. 8, 2017), involved an insurance coverage dispute relating to water damage in a church basement. There was not an appraisal provision in the policy. Assume there was one similar to this case, however. A competent appraisal panel would have consisted of persons experienced in the valuation of property and commercial property repair and replacement. For example, persons familiar with the cost of repairing or replacing office equipment and furniture and persons familiar with the cost of repairing or replacing flooring, drywall, and electrical, plumbing, and mechanical systems, etc. But the primary issue in the case was not valuation. The primary issue was liability, which turned on questions of causation and coverage, specifically what caused the water

damage in the church basement. *See id.* at *2-3. The witnesses regarding causation were an expert engineer, who testified regarding the operation of sewer systems, and the environmental manager for the City of Cedar Rapids, who testified regarding the backflow in the city's sanitary sewer system caused by flooding. *See id.* at *3. There is no reason to believe an appraisal panel would have had the competency to determine these complicated issues or would have had access to the resources, e.g., schematics and data regarding the city's sewer system, to determine these issues. Our hypothetical appraisal panel could have determined, however, the cost to repair and/or replace the damaged property, and the appraisal award could have served as a measure of damages after liability had been established in the district court. *Salem United Methodist Church* is but a single example, but one can envision countless scenarios in which the persons conducting an appraisal do not have the competency to determine causation and the persons opining on causation would not have the competency to determine valuation. This is why it is better to keep the issues separate and distinct.

B.

I next address the issue of whether this particular appraisal panel had the authority to determine causation. Because the appraisal provision at issue is contractual, the right of appraisal and the scope of appraisal are governed by the terms of the policy. *See State Room, Inc. v. MA-60 State Assocs., L.L.C.*, 995 N.E.2d 807, 812 (Mass. App. Ct. 2013) ("[S]o too an appraiser can exceed his authority by making an award which is not within the limits of the submission to him. The issue turns on the agreement of the parties."); *Merrimack Mut. Fire Ins.*

Co. v. Batts, 59 S.W.3d 142, 152 (Tenn. Ct. App. 2001) ("An appraiser's authority is limited to the authority granted in the insurance policy or granted by some other express agreement of the parties."); *Terra Indus. Inc.*, 981 F. Supp. at 607 (explaining the scope of appraisal can be determined from the language of the policy).

Our rules governing the interpretation and construction of insurance policies are well-settled. The cardinal principle is the parties' intent controls, and we determine intent by examining the text of the policy. *See Amish Connection*, 861 N.W.2d at 236. Here, the policy provides coverage for "direct physical loss of or damage to Covered Property . . . caused by or resulting from any Covered Cause of Loss." (Policy ¶ A.) "Covered Causes of Loss" includes direct physical loss or damage except those causes of loss excluded or limited. (Policy ¶¶ A.3(a), (b), (c).) Either party may make a demand for "an appraisal of the loss." The right to demand "an appraisal of the loss" can be invoked only where there is disagreement regarding "the amount of loss." The policy then sets forth a procedure for selecting appraisers and an umpire. The policy also describes the function of the appraisers, providing the "appraisers will state separately the value of property and the amount of loss."

The language of the policy limits the appraisal's scope to determining the monetary value of a loss and does not extend to questions of coverage and causation. First, the common understanding of "appraisal" is the "determination of what constitutes a fair price for something or how its condition can be fairly stated; the act of assessing the worth, value, or condition of something." *Appraisal*, Black's Law Dictionary (10th ed. 2014). As commonly understood, an

appraisal does not encompass determination of issues other than valuation. *See Jefferson Davis Cty. Sch. Dist. v. RSUI Indem. Co.*, No. 2:08-cv-19-KS-MTP, 2009 WL 367688, at *2 (S.D. Miss. Feb. 11, 2009) (stating "the purpose of an appraisal is not to determine the cause of loss or coverage under an insurance policy; rather, it is 'limited to the function of determining the money value of the property' at issue" (citation omitted)). Second, the policy limits the appraiser's authority to stating the "value of the property and the amount of loss." Nothing in the policy gives the appraisers the authority to opine on liability, coverage, or causation. *See Terra Indus.*, 981 F. Supp. at 607 (construing similar provision to mean "the appraisal process determines the 'amount of actual cash value and loss,' not legal questions of coverage"); *Rogers v. State Farm Fire & Cas. Co.*, 984 So. 2d 382, 392 (Ala. 2007) (finding "no ambiguity in the term 'the amount of loss' as used in the appraisal clause" and "holding that an appraiser's duty is limited to determining the 'amount of loss'—the monetary value of the property damage"); *Batts*, 59 S.W.3d at 152 (holding an appraisal clause regarding the "amount of the loss" limited appraisers to determining "the monetary value of the property damage" and not questions of coverage, liability, or causation). Third, the policy used definite articles to limit the scope of appraisal. Specifically, the policy limits the scope of appraisal to "the loss" and "the amount of loss." Use of the definite article "the" means "the loss" has an antecedent; specifically "the loss" must refer to a specific loss rather than a non-specific loss to be determined by the appraisers. *See Am. Bus Ass'n v. Slater*, 231 F.3d 1, 4–5 (D.C. Cir. 2000) ("[I]t is a rule of law well established that the definite article 'the' particularizes the subject which it precedes. It is a word of limitation as opposed to the indefinite or

generalizing force of 'a' or 'an.'" (citation omitted)); *State v. Hohenwald*, 815 N.W.2d 823, 830 (Minn. 2012) ("The definite article 'the' is a word of limitation that indicates a reference to a specific object."). "The loss" is to be determined by the finder of fact, while "the amount" of "the loss" is for the appraisal panel. Fourth, as discussed above, there are practical reasons why causation should not be considered within the scope of appraisal.

The district court was thus correct to conclude the appraisal panel award was not binding on causation. "An appraisal is a supplementary arrangement to arrive at a resolution of a dispute without a formal lawsuit." *Cent. Life Ins. Co. v. Aetna Cas. & Sur. Co.*, 466 N.W.2d 257, 260 (Iowa 1991). "Appraisal awards do not [constitute] a formal judgment and may be set aside by a court." *Id.* An appraisal award will be set aside where the appraisal provision was improperly invoked, where the appraisers exceeded the scope of work, or where there is fraud, mistake, or misfeasance on the part of an appraiser or umpire. *See id.*; *Taylor*, 2008 WL 4525496, at *5 (holding the appraisal award was confined to its proper scope where the district court specifically discarded "any discussion of facts and/or causation in the report"); Law & Starinovich, supra, at 315 (stating the award may be challenged if "the appraisers go beyond their scope of authority" and citing cases). Here, the appraisal panel made a determination of causation in addition to a determination of value. The determination of causation was outside the scope of the appraisal panel. Causation is a question of liability, which, under the circumstances, was a question reserved for the district court. The district court was well within its authority to disregard the appraisal panel's determination on causation.

C.

Once the district court determined it was not bound by the appraisal panel's determination of causation, the district court was required to consider the issue. The only contested issue with respect to causation was damage to the roofs. The district court found the hail storm at issue caused no damage to the roofs or was not the sole cause of damage to the roofs. The district court found any roof damage was caused in whole or in part by other causes, including manufacturer's defect and "multiple potentially damaging hail storms preceding the storm in question." In reaching this conclusion, the district court relied on the testimony of Marcus Harbert, who was the only person to inspect the roofs before and after the storm. Harbert testified there was damage to the roofs prior to the storm at issue. This fact is essentially conceded by the association, which was seeking to repair the roofs prior to the storm at issue. Harbert's testimony was also supported by the insurance carrier's expert witness.

On this record, the district court's judgment should be affirmed. "This case was tried to the court as a law action and our review is for the correction of errors at law." *Hendricks v. Great Plains Supply Co.*, 609 N.W.2d 486, 490 (Iowa 2000). "The district court's findings of fact have the effect of a jury verdict and are binding on us if supported by substantial evidence." *Id.* "Evidence is substantial when a reasonable mind would accept it as adequate to reach the same findings." *Id.* "We construe the district court's findings broadly and liberally." *Id.* "In case of doubt or ambiguity we construe them to uphold, rather than defeat, the judgment." *Id.* "A corollary rule prohibits us from weighing the evidence or the credibility of the witnesses." *Id.* When the evidence is viewed in

the light most favorable to the district court, the district court's findings are supported by substantial evidence.

II.

I would affirm the judgment of the district court for an additional, independent reason. As the majority notes, the policy at issue contained an anticoncurrent clause. The clause is enforceable. *See Amish Connection, Inc.*, 861 N.W.2d at 241 (stating anticoncurrent clauses are enforceable); *Salem United Methodist Church v. Church Mut. Ins. Co.*, No. 13-2086, 2015 WL 1546431, at *3 (Iowa Ct. App. Apr. 8, 2015) (enforcing anticoncurrent clause and stating if an excluded cause "is a concurrent cause, there is no coverage"). The district court found and concluded any loss was excluded by the anticoncurrent clause because any damage to the roofs was caused by "one or more things other than or in addition to the August 8, 2012 storm," including "wear and tear, mechanical related to installation, faulty workmanship, [and] manufacturer defect."

The majority contends the district court erred in finding any loss was excluded by the anticoncurrent clause because the appraisal panel's determination of causation was binding on the district court. I disagree. First, I disagree with the proposition that the appraisal panel was empowered to determine of causation. Second, I also disagree with the proposition that the district court would be bound by any such determination. However, even assuming the district court was bound by the causation determination, the causation determination does not resolve the issue. The appraisal panel determined the storm at issue was *a cause* of damage to the roofs, but the

appraisal panel did not determine the storm was *the sole and proximate cause* of damage to the roofs. Indeed, the appraisal award explicitly disclaimed making any such determination, providing "The award does not include an evaluation or determination or coverage, policy exclusions or the relative causation of the same." It was thus incumbent upon the district court to resolve any coverage issues, policy exclusions, and issues of concurrent causation. *See North Glenn Homeowners Assn.*, 854 N.W.2d at 71 (stating coverage determination is for the district court).

Here, the district court properly made an independent determination that the loss, if any, caused by the storm was an excluded cause of loss under the terms of the policy. When the evidence is viewed in the light most favorable to the district court's judgment, the district court's findings regarding other causes of loss are supported by substantial evidence.

III.

For the foregoing reasons, I would affirm the judgment of the district court.

IOWA APPELLATE COURTS

State of Iowa Courts

Case Number	**Case Title**
16-0121	Walnut Creek Townhome Association v. Depositors Insurance

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